



CASE CLIPS

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CRIMINAL LAW ISSUE

HAYDEN v. STATE, No. 18A04-0202-CR-85, ___ N.E.2d ___ (Ind. Ct. App. July 16, 2002).

RATLIFF, Senior Judge

Hayden raises one issue for our review, which we restate as: whether the assessment of costs pursuant to statutes that were not in effect on the date the offense was committed constitutes a violation of the ex post facto provisions of the state and federal constitutions.

On October 3, 2001, the State filed an information alleging that Hayden had committed five forgeries. Each count alleged that the offense occurred "on or about May 8, 2000." . . . [O]n December 13, 2001, the trial court sentenced Hayden. . . . The trial court assessed \$129.00 in court costs. This assessment included a two dollar document storage fee pursuant to Ind. Code § 33-19-6-18.1 and a two dollar automated record keeping fee pursuant to Ind. Code § 33-19-6-19. These statutes became effective on July 1, 2001.

....

An ex post facto law is one which imposes a punishment for an act not punishable at the time it was committed, or which imposes punishment additional to that prescribed at the time the offense was committed. [Citation omitted.] . . .

....

Our task is to determine whether the statutes authorizing the costs at issue are procedural or substantive for purposes of the ex post facto provisions of the Indiana and United States constitutions. Although there have been a number of Indiana cases interpreting these provisions, neither this court nor our supreme court have set forth a definition of "procedural" or "substantive" as these terms are used in relation to the provisions. Other states have done so, however, and we find the following definitions useful: "Procedural, adjective or remedial law is that portion of the law which prescribes *the method of enforcing a right or obtaining a redress* for the invasion of that right. Substantive law, on the other hand, is that portion of the law which *creates, defines and regulates rights*." [Citation omitted.] . . .

....

Ind. Code § 33-19-6-18.1 and Ind. Code § 33-19-6-19 do not make any substantive change to the criminal law. They do not add to the elements of any offense or alter the sentencing statutes. Furthermore, the statutes are not intended as an increase in a criminal punishment. Indeed, the statutes are included in Title 33 ("Courts and Court Officers"), not in Title 35 ("Criminal Law and Procedure"), and by their terms the statutes provide for the assessment of the fees in civil, as well as criminal, actions. The statutes serve a procedural function by providing the funding for document storage and automated record keeping in all types of cases. Given these factors, we conclude that the application of the aforementioned statutes was not a violation of the ex post facto provisions of either the Indiana or the United States Constitutions.

....

BARNES and RILEY, JJ., concurred.

CIVIL LAW ISSUE

MISHLER v. MAC SYS., INC., No. 27A02-0111-CV-778, ___ N.E.2d ___ (Ind. Ct. App. July 16, 2002).

HOFFMAN, Senior Judge

The Mishlers filed a suit for damages against MAC. MAC answered and raised counterclaims on the basis of breach of contract and libel/slander. MAC also petitioned the court to issue an injunction enjoining the Mishlers from “[m]aking verbal or written statements to members of the public regarding the character, qualifications, workmanship or reputation of MAC” and “[d]isplaying signs referring, in any way, to MAC, its character, qualifications, workmanship or reputation, or to this case.” Appellants’ Appendix at 8. The trial court held a hearing on the petition and subsequently issued an injunction. The trial court’s order did not prohibit the Mishlers from making verbal comments about MAC, but it did direct the Mishlers to remove the sign and to refrain from putting up any other sign referring to MAC.

The Mishlers contend that the trial court’s injunction operates as an unconstitutional prior restraint on speech in violation of Article I, Section 9 of the Indiana Constitution.

One question that becomes immediately apparent is whether Article I, Section 9, which expressly refers to the passage of a law restricting free speech, also prohibits courts from accomplishing the same restriction through the issuance of an injunction. No Indiana case has directly addressed this issue under Article I, Section 9; however, the issue has been addressed under Article I, Section 23 of our constitution. Although Article I, Section 23, the Indiana Equal Privileges and Immunities Clause, expressly applies only to acts of the General Assembly, it has been interpreted to apply where the State is “sufficiently involved to treat decisive conduct as state action.” See *Palin v. Indiana State Personnel Department*, 698 N.E.2d 347, 353-54 (Ind. Ct. App. 1998).⁵ . . . We hold that Article I, Section 9 of the Indiana Constitution is intended to prohibit Indiana courts, as well as the General Assembly, from abridging the free speech rights of Indiana citizens. Our supreme court has observed that the corresponding clauses of Article I, Section 9 are common in state constitutions and are referred to as an explication of the “freedom-and-responsibility standard.” *Price*, 622 N.E.2d at 958. Under this standard, a State “may not impair the flow of ideas; instead, its sole authority over expression is to sanction individuals who commit abuse.” *Id.* Furthermore, a State may not choose the means by which a person decides to speak; a person must have an opportunity to speak his mind “in whatever manner the speaker deems most appropriate.” *Whittington*, 669 N.E.2d at 1368. . . .

In the present case, the Mishlers chose to express their displeasure with MAC through the medium of a sign. The Mishlers’ expression, while not political speech, was arguably speech expressing a public concern, and was certainly within the broad category of speech “on any subject whatever” that is protected by Article I, Section 9. A hearing was held to determine whether a preliminary injunction should be issued to prevent the Mishlers from continuing to voice their dissatisfaction with MAC’s services. Rather than a determination on the merits, the trial court’s injunction was, at most, a determination that MAC could make a *prima facie* case against the Mishlers. [Citations omitted.] Thus, upon a preliminary determination of a *prima facie* nature, the Mishlers were prevented from

⁵ While our supreme court was very careful in *Price* to refer to the limitations placed upon the General Assembly by Article I, Section 9, it spoke in terms of the limitations placed upon “state action” in the later case of *Whittington v. State*, 669 N.E.2d 1363 (Ind. 1996). Although both cases dealt with the issue of the General Assembly’s power to limit speech through content-neutral statutes, and thus the issue before us was not before the court in *Price* and *Whittington*, we do not think that use of the term “state action” in *Whittington* was an oversight.

expressing their opinion through the sign at issue or any sign like it. If the Mishlers chose to ignore the injunction and express their opinion in this manner, they were subject to punishment for contempt. [Citation omitted.]

The upshot is that the Mishlers have been prevented from exercising their state constitutional right to speak “on any subject whatever” by the means they deemed most appropriate, and the restriction on their right to expression comes after only the most preliminary of determinations by the trial court. Our constitution does not give the trial court the power to force one person to speak well of another. . . .

....

SHARPNACK, J., concurred.

ROBB, J., filed a separate written opinion in which she concurred, in part, as follows:

I respectfully concur in the result reached by the majority. . . .

....

. . . [B]ecause MAC has the availability of a tort suit to remedy the damages incurred to its reputation as a result of the Mishlers’ statements, injunctive relief is not warranted. Further, because reversal is called for under state law, I believe that we need not address the Mishlers’ constitutional claim that the injunction is an impermissible prior restraint under the Indiana Constitution.

<p>CASE CLIPS is published by the Indiana Judicial Center National City Center - South Tower, 115 West Washington Street, Suite 1075 Indianapolis, Indiana 46204-3417 Jane Seigel, Executive Director Michael J. McMahon, Director of Research Thomas R. Hamill, Staff Attorney Thomas A. Mitcham, Production The Judicial Center is the staff agency for the Judicial Conference of Indiana and serves Indiana Judges and court personnel by providing educational programs, publications and research assistance.</p>
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